APPENDIX

APPENDIX I.

United States District Court,
Northern District of Georgia,
Rome Division.

The Day Companies, Inc.,
Plaintiff,

vs.

Claud T. Patat, Jr., John L. Farris and Patat Plywood Corporation,
Defendants.

} Civil Action Number 1945.

Order on Defendants' Motion to Dismiss.

This is a diversity action for injunctive relief and damages for the enforcement of a covenant not to compete, allegedly violated by defendants. The complaint shows that in April of 1966 John L. Farris was the president and majority stockholder of Farris Plywood Co., a company engaged in the manufacture and sale of plywood. Claud T. Patat, Jr. was manager of Farris Plywood Co. On April 20, 1966, Farris Plywood Co. was sold to Columbus Packing Co. This sale of the business was accompanied by a "covenant not to compete" wherein John L. Farris agreed that he would not, "either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris." A later merger gave The Day Companies, Inc., the plaintiff herein, all the rights, title and interest which Columbus Packing Co., Inc. had in the business and in the contract with John L. Farris. The complaint

goes on to allege that in March, 1967, the defendant corporation Patat Plywood Corp. was incorporated with Claud T. Patat, Jr. and John L. Farris as officers and began to operate in the manufacture and sale of plywood. Claud T. Patat, Jr. and Patat Plywood Co. allegedly had knowledge of the terms of the contract and were abetting John L. Farris in the violation of his contract with plaintiff. Plaintiff asks for damages as well as injunctive relief.

Defendants now move to dismiss pursuant to Rule 12(b) on the ground that this covenant not to compete is contrary to the public policy of Georgia and therefore null and void. More specifically, defendants argue that the phrase "in the area presently operated in by Farris" is too indefinite as to the description of the business or the employment prohibited. Moreover, it is contended that the covenant is unreasonable as to the territory in which such conduct is proscribed. Defendants concede that the Georgia courts have treated somewhat differently covenants which are ancillary to the sale of a business, but contend that these decisions have been limited in that variation is allowed only as to the time factor and not as to description of territory and the prohibited activity. Finally, defendants argue that the covenant undertook to prohibit competition with Farris Plywood Co. only and not competition with The Day Company. Accordingly, these defendants could not have been in competition with Farris Plywood Co. as it was neither in existence nor in operation at the time of the filing of this complaint.

Plaintiff argues that defendants' motion to dismiss is in reality not unlike a general demurrer. As to the indefiniteness of the covenant, plaintiff points out that the entire contract has not been incorporated into the complaint and that plaintiff should have an opportunity to present its case by introduction of oral evidence to sup-

port the allegations of the complaint, by showing, inter alia, the specific area in which Farris Plywood Co. was operating at the time the covenant was signed, the area in which Patat Plywood Corp. is now operating, the knowledge by defendants of the area in which Farris Plywood Co. was operating, and the willful violations of the terms of the covenant by defendants. Plaintiff contends that the above showing will constitute the requisite definiteness as to prohibited conduct that has been required by the Georgia courts. Also in support of this position, plaintiff contends that the Georgia courts have given greater latitude in those covenants relating to the sale of a business than in those covenants ancillary to an employment contract. Through this argument plaintiff seeks to distinguish many of the recent cases cited by defendant. Furthermore, plaintiff contends that the covenant is not unreasonable as to territory, for the covenant applied only to the area in which Farris Plywood Co. was then operating.

The standard to be used in ruling upon a motion to dismiss is clear. "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A *Moore's Federal Practice* ¶ 12.08 at 2245 (2d ed. 1967). This standard has been frequently restated and emphasized by the Fifth Circuit. See, *e. g.*, Arthur H. Richland Co. v. Harper, 302 F. 2d 324.

The problem of covenants not to compete in Georgia has caused great difficulty for the courts and practitioners over a long period of time. Georgia has been particularly strict in these matters because of a long-standing public policy prohibiting contracts in "general restraint of trade." See Georgia Code, § 20-504. Likewise, there is an admonition against the use of an injunction to enforce

such contracts of similar long-standing. See Georgia Code, § 20-504. With such background, contracts against competition and in restraint of trade have been frequently held to be void on their face as against Georgia public policy. Three prime requisites have been imposed by the Georgia courts on covenants not to compete: (1) reasonableness as to the time of the restraint; (2) definiteness and reasonableness as to the territory involved; (3) definiteness as to the nature, kind and character of the activities prohibited by the contract. This third requisite as properly understood actually contains two distinct elements: (a) definiteness as to the type business in which competition is prohibited and (b) definiteness as to the type activities within a given business that are prohibited. The proper inquiry in this opinion is whether the covenant in question is as a matter of legal certainty unreasonable or uncertain as to any of these requisites. This Court's personal views on the preferable criteria for an enforceable covenant not to compete are not controlling, but must yield to the law as set forth by the highest courts of Georgia to determine this matter. Also, it should be noted at the outset that the question of the adequacy of the terms of this covenant is a question of law. See *e. g.*, Hood v. Legg, 160 Ga. 620 (1925).

Plaintiff takes the position that the Georgia courts have demonstrated more leniency in construing a covenant ancillary to the sale of a business as opposed to a covenant in an employment contract. From a reading of the relevant Georgia cases, the Court must agree that the position taken by plaintiff on this matter is correct, logical, and appropriate.[1]

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[1] The Court confidently makes this assertion, for the distinction is explicitly mentioned by the Georgia courts and finds support in both logic and various other authorities. However, in the citation of cases, the Georgia courts often interchange the cases concerning employment contracts and the cases relating to the sale of a busi-

Having disposed of the threshold question, it is necessary to examine more closely the particular provisions of this covenant as against the three requisites previously mentioned. The time requisite presents no problem. The covenant is limited to a five year period and under the Georgia cases, this requirement is easily met. See, *e. g.*, Brittain v. Reed, 220 Ga. 794 (1965); Wood v. McKinney, 205 Ga. 370 (1949).

The limitations in the covenant as to territory and the kind of activities prohibited are found in the phrase "in the area presently operated in by Farris." Are these limitations sufficiently definite and reasonable to meet the tests set out by the Georgia courts? Setting aside for the moment any technical questions as to the admissibility of parol evidence in this situation, it seems rather clear that plaintiff can by evidence establish that the covenant was sufficiently definite and reasonable as to the prohibited territory. The Georgia cases seem to allow a restraint which extends only throughout the territory covered by a business and its goodwill. Kutash v. Gluckman, 193 Ga. 805 at 808 (1942). Recent cases such as Fox v. Avis

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ness. For example, in Fox, *infra*, a case relating to the sale o stock, the Court cites 10 cases, nine of which deal with employment contracts. This interchanging of cases, while confusing the pattern, would not seem to affect the logic or the validity of the position taken by the Court in the above text.

Some of the Georgia cases have held that the time requisite in a covenant ancillary to the sale of a business is not subject to the reasonableness test. See, *e.g.*, Holtman v. Knowles, 141 Ga. 613 (1914); Swanson v. Kirby, 98 Ga. 586 (1896). Other cases indicate strongly that flexability as to all requisites is the rule in Georgia. See, *e.g.*, The Insurance Center, Inc. v. Hamilton, 218 Ga. 597 (1963); Orkin Exterminating Co. of South Ga. v. Dewberry, 204 Ga. 794 (1949); Hood v. Legg, 160 Ga. 620 (1925). For support of this differentiation, the Georgia courts have frequently cited the *Corpus Juris Secundum* treatment of this problem. See 17 *C. J. S.* at 1136 for a general statement of the distinction. The rationale for such a distinction is discussed in detail at 17 *C. J. S.*, § 254, fns. 46.5-47.10. For a similar approach, see the well reasoned opinion in Hood v. Legg, 160 Ga. 620 at 628-29 (1925).

Rent-A-Car Systems, Inc., Civil Action No. 24,124 (Ga. Supreme Court, September 7, 1967), support this view as to territorial limits in covenants ancillary to the sale of a business or analogous transactions. As explained before, the cases involving employment contracts are not applicable. See, *e. g.*, Orkin Exterminating Co. of South Ga. v. Dewberry, *supra* (employment contract—practically all of Georgia held to be an unreasonable territory). See The Insurance Center, Inc. v. Hamilton, 218 Ga. 597 at 602-03 (1963) for a representative listing of cases dealing first with the sale of a business, then with covenants in employment contracts. But this ends this inquiry only for purposes of the motion to dismiss. In Turner v. Robinson, 214 Ga. 729 (1959), the Court suggests that the ultimate inquiry in determining the question as to reasonableness of territory limitation must involve a consideration by the Court of "the nature and extent of the trade or business, the situation of the parties, and all the other circumstances . . ." *Id.* at 730. Thus, it is concluded that the question of area may be explained by other evidence. Attention is directed to the more difficult question as to whether this covenant complies with the third requisite, *i. e.*, definiteness as to the kind of activity and the business area prohibited. Both parties attempt to catalogue a number of the cases relating to covenants not to compete, but the value of these efforts is greatly diminished by the presence of such a large number of cases relating to employment contracts. In two early cases, provisions with considerable breadth were upheld. See Monis-Forrester Oil Co. v. Taylor, 158 Ga. 201 (1924) ("the same kind or similar business"); Holtman v. Knowles, 141 Ga. 613 (1914) ("not engage in the same business"). These two cases have been cited rather frequently by the Georgia courts but most of these subsequent cases have used them to support points of law other than the one presently under consideration. Another case which lends some sup-

port to the view taken by plaintiff is Black v. Horowitz, 203 Ga. 294 (1948) ("shall not engage in a like business in any manner whatsoever") cited approvingly in the Insurance Center, Inc. v. Hamilton, 218 Ga. 597 (1963). However, most of the reported cases involve covenants with a much more detailed recitation as to the prohibited activities and the type of business prohibited. A recent Georgia case must be mentioned in completing this discussion. The decision in Fox, *supra*, involved two separate contracts. The court upheld a covenant incident to a stock purchase option agreement wherein the description of the prohibited activity was as follows: ". . . in any phase of the vehicle rental or leasing business or any other business in which employee is engaged at the time of 'the termination of his employment . . .' " However, in the same opinion the court rejected a stock purchase agreement wherein the party agreed "not to engage in competition with the company or any subsidiary . . ." This provision was held to be indefinite and unreasonable in the description of the prohibited business.

It still remains for the Court to examine the particular language of this covenant as against the legal principles heretofore discussed. The third requirement—definiteness as to activities and as to the type business—must be met in the language "be connected with or concerned in any business or employment which shall be in competition with Farris." Initially, it should be noted that the language "connected with or concerned with" on its face tends toward indefiniteness and overbreadth. Moreover, this language tends to militate against the finding of a construction which would provide definiteness as to the third requirement. The Court is less concerned about the definiteness of the "type business" requisite, for the agreement on its face gives some guide as to what subject area was intended, *i. e.*, any business which was in competition with Farris, and therefore could be explained

by other evidence. However, the Court looks more critically at the definiteness and reasonableness of the "prohibited activities" requisite. It could be argued that the agreement does provide for this requisite in the phrase "or employment which shall be in competition with Farris." The Court cannot accept this argument nor can the Court agree that this covenant is sufficiently definite and/or reasonable as to the "prohibited activities" requisite. If the agreement had prohibited merely the selling and manufacturing of timber products or some other definite statement, then some criteria of definiteness as to activities would be present. If the plaintiff argues that the agreement is definite as to activities in that it prohibits all activities which are "connected with or concerned with" the business, then the plaintiff is faced with an unsurpassable problem as to reasonableness in scope.[2] Plaintiff argues that the needed definiteness can be supplied by reference to the knowledge of the parties as to what they understood to be the activities which were prohibited. Absent some criteria on the face of the covenant, such an argument is contrary to well established principle of contract law and certainly the Georgia courts have been unwilling to uphold such a position.[3] Accordingly, the

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[2] It should be noted that the larger the scope of the activities and type businesses prohibited, the greater the likelihood that the courts will find an unreasonable restraint on trade. This is entirely logical and yet so many drafters of these agreements entirely overlook this simple position.

[3] The Georgia courts apparently have not dealt expressly with the application of the parol evidence rule to these covenants. Certainly, the Georgia courts have allowed reference to facts outside the contract in considering the question of reasonableness. See Hood v. Legg, 160 Ga. 620 at 633-34 (1925). The Court does not deem it necessary to decide the exact relevance of this doctrine to covenants of this kind. However, in the Court's view, the plaintiff's position would be strengthened if the covenant on its face attempted to incorporate by reference facts outside the contract. The parties did attempt to incorporate such facts as to the type business prohibited. However, as to the activities prohibited, there is no such attempt.

Court must find that the covenant is on its face indefinite as to the activities prohibited and therefore void and unenforceable as a matter of law.

The Court has taken such pains in explaining this decision because of a great concern for clarity in this uncertain area of the law. Practicing attorneys are understandably wary of this type of agreement. The courts are very restrictive in this area and have provided very few clear guidelines for the practicing attorney.

Beyond the obvious requirements of time and area in Georgia, the agreement must be sufficiently specific and definite to enable a third party (or court) to ascertain the scope of activity prohibited as well as the type of business within which that activity is restricted. Here, there is no certain standard of conduct and the agreement is fatally defective in this regard.

For such reasons, the motion to dismiss is granted.

It Is So Ordered.

This the 1st day of February, 1968.

/s/ Sidney O. Smith, Jr.,
Sidney O. Smith, Jr.,
United States District Judge.

Filed in Clerk's Office
and a True Copy Certified, This
Feb. 6, 1968
Claude L. Goma, Clerk
By: S. J. Langston
Deputy Clerk

APPENDIX II.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 26,093.

The Day Companies, Inc.,
Appellant,
versus
Claud T. Patat, Jr., Et Al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(November 26, 1968)

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Morgan, Circuit Judge: This diversity action sought injunctive relief and damages for the enforcement of a covenant not to compete, allegedly violated by defendants Claud T. Patat, Jr., John L. Farris, and Patat Plywood Corporation. Appellant is The Day Companies, Inc., successor to Columbus Packing Company, Inc.

The appellees, Patat, et al., filed a motion to dismiss pursuant to Rule 12 (b), Federal Rules of Civil Procedure, on the ground that the covenant not to compete was contrary to the public policy of Georgia and therefore null and void, and that the covenant was so indefinite as to the description of the business and employment prohibited

to be unreasonable. Day afterward amended the complaint. The District Court held that the amendment did not cure the complaint and dismissed the complaint as amended. It is from this order of dismissal that the appeal was brought to this Court.

The action alleges that in April of 1966, John L. Farris was the president and majority stockholder of Farris Plywood Company, a corporation engaged in the manufacture and sale of plywood in Cuthbert, Georgia. Claud T. Patat, Jr., was manager of Farris Plywood Company. On April 20, 1966, Farris Plywood Company was sold to Columbus Packing Company, a Mississippi corporation. This sale of the business was accompanied by a "covenant not to compete" wherein John L. Farris agreed:

> "the said John L. Farris, individually, further agrees that during the term of his said employment, and for a period of five years thereafter (that is, until December 31, 1971) he will not, either directly or indirectly, alone or in concert with any other person, firm or corporation, be connected with or concerned in any business or employment which shall be in competition with Farris in the area presently operated in by Farris."

A later merger gave the Day Companies, Inc., the appellant-plaintiff herein, all the rights, title and interest which Columbus Packing Company, Inc., had in the business and in the contract with John L. Farris. In March, 1967, the defendant corporation, Patat Plywood Corporation, was incorporated with Claud T. Patat, Jr., and John L. Farris as officers, and began to operate in the manufacture and sale of plywood in Polk County, Georgia, some 175 miles north of Cuthbert, Georgia. Claud T. Patat, Jr., and Patat Plywood Corporation allegedly had knowledge of the terms of the contract and were abetting John L. Farris in the violation of his contract with plaintiff The Day Companies.

The ultimate issue which this Court must determine is whether the provision of the contract set out above is void as contrary to the public policy of Georgia, or whether such provision is valid and therefore enforceable. Under *Erie – Klaxon,*[1] the District Court was required to apply the Georgia law, sitting as a Georgia Court.

The three prime requisites to sustain a covenant not to compete in Georgia are: (1) reasonableness as to the time of restraint; (2) definiteness and reasonableness as to the territory involved; and (3) definiteness as to the nature, kind and character of the activities prohibited by the contract.

Although the appellees attempt to void the contract as violating the requisites as to time and territory, we conclude that the District Court was correct in its conclusions that the contract was valid as to these two essentials of a covenant not to compete.

The contract in the case at hand was limited to five years. This restriction was reasonable. The Georgia authorities support the proposition that a contract for the sale of business may contain a covenant not to compete that is unlimited in time. As far back as 1877 the Supreme Court of Georgia dealing with the sale of a business held in the case of *Goodman v. Henderson,* 58 Ga. 567, that "the limit of time made no difference if the contract was limited as to space".

Considering the challenge as to the territory prerequisite, was this covenant reasonable and definite as to the area involved here? The limitation in the covenant as to territory in the case at hand is found in the phrase "in the area presently operated in by Farris". The cases from the Georgia Courts seem to permit restraints which extend throughout the territory covered

[1] *Erie R. Co. v. Tompkins,* 304 U. S. 64; *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U. S. 487.

by a transferred business. As was observed by Judge Jenkins of the Georgia Supreme Court in *Kutash v. Gluckman,* 193 Ga. 805, "a contract which affords a fair protection to the party in whose favor it is made, and is not injurious to the public . . . may extend to all the territory covered by the business the good will of which has been sold . . ." We agree with the Court below that the standard of area is met in the agreement in question.

We now reach the third requirement dealing with the definiteness as to the activities and as to the type business. On this requisite the Court below ruled that the covenant was "indefinite as to the activities prohibited and therefore void and unenforceable as a matter of law." We disagree and reverse.

The part of the covenant ruled void reads:

> "he shall not, either directly or indirectly, alone or in concert with any other person, firm or corporation, *be connected with or concerned in any business or employment which shall be in competition with Farris"* (emphasis supplied).

Most of the Georgia cases encountered in this restrictive covenant field deal with the first two prerequisites, to-wit: time and space. In attempting to ascertain the applicable Georgia rules, there is no difficulty in finding the appropriate general statements on all three requisites. As was so aptly stated by Judge Hoover of the Ohio Court of Common Pleas,[2] "This is not one of those questions on which the legal researchers cannot find enough to quench his thirst. To the contrary, there is so much authority, it drowns him." In sum, the Georgia rule, and most other jurisdictions, is that a restraint on trade in the form of a covenant will be countenanced when, under all the circumstances, it is reasonable. This question, though

[2] *Arthur Murray Dance Studios of Cleveland v. Witter,* 105 N. E. 2d 685, 687.

largely factually orientated, is one for the Court. *Rakestraw v. Lanier,* 1898, 104 Ga. 188, and Chief Judge Brown's opinion in *Budget Rent-A-Car Corporation of America v. Fein* (5 Cir., 1965), 342 F. 2d 509, 514.

The dominant considerations of reasonableness have been expressed for Georgia in several cases. In considering whether the limitations are reasonable, the Court must consider the nature and extent of the trade and the business, the situation of the parties, and all the other circumstances. *Rakestraw v. Lanier,* supra.

To withstand attack, the covenant must be reasonably necessary to protect the interest of the party in whose favor it is imposed, and must not unduly prejudice the interest of the public. The restrictions imposed upon the seller must not be larger than are necessary for the protection of the buyer.

Georgia, along with many other jurisdictions, has allowed greater latitude in determining the reasonableness of a restrictive covenant when the covenant relates to the sale of a business than in those covenants ancillary to an employment contract. See *Orkin Exterminating Co. of South Georgia v. Dewberry,* 204 Ga. 794.

A covenant not to compete as an adjunct to the sale of a business enables the seller to capitalize on the disposition of his good will and receive a higher price. In many instances, such as in the case at hand, the covenant may have been the dominant inducement to the Mississippi purchaser, realizing that the plant it was purchasing was a going concern with hope of retaining the present customers. Likewise, the likely effect of the sale of the going business from the seller to the buyer would leave the area with one concern or at least with one less concern.

The Georgia courts dealing with the sale of businesses permit more indulgence as to the scope of activities prohibited by the restrictive covenants. The District Court

found that the covenant in the contract at hand indefinite as to the activities prohibited and therefore void and unenforceable as a matter of law. With this holding we cannot agree. The Georgia courts, according to this Court's interpretation of *Strauss v. Phillips,* 180 Ga. 641, and *Morris-Forrester Oil Co. v. Taylor,* 158 Ga. 201, would have found this "sale of business" more acceptable.

In *Strauss v. Phillips,* supra, Phillips was engaged in the retail jewelry business in Atlanta, being connected with and owning stock in the business. Strauss purchased all the stock and interest in the business from Phillips, and a contract was entered into between the buyer and the seller. As a consideration of the purchase, Phillips contracted that for a term of five years he would not ". . . enter or engage, directly or indirectly, in the retail jewelry business or the sale of jewelry, silverware, diamonds, or watches, either as agent or merchant . . ."

Phillips sought to work as a bookkeeper and salesman, and when Strauss sought injunctive relief, Phillips contended the covenant was contrary to public policy and prevented him from doing any work or labor or earning a sustenance. The Supreme Court of Georgia in a full bench decision in *Strauss* held at page 644:

> "The question before the court is whether or not the defendant has violated his contract with petitioner by engaging 'directly or indirectly' in the retail jewelry business in the time and within the territorial limits fixed by his contract. In *Morris-Forrester Oil Co. v. Taylor,* 158 Ga. 201 (122 S. E. 680), involving the sale of a certain oil and gasoline business it was held that the defendant 'had covenanted not to become a constituent part, sharer in, partaker of, or engage in or reap the benefits from the sale of gasoline and oil within 20 miles of Atlanta, and the fact that he was engaged as an employee of the Continental Oil Company would be no less a violation of the covenant

than if he conducted the business in his own name.' It was held further in that case that a contract not to enter into a certain 'business or the same kind or similar business is unambiguous and excludes on the part of one who makes such a covenant *any participation or sharing or taking a part in the aid of such sales.*' (Italics ours.) See also *Taylor v. Morris-Forrester Oil Co.*, 166 Ga. 43 (142 S. E. 153). It is argued that the construction placed upon the contract in the instant case is contrary to public policy. This question was ably discussed by Gilbert, J., in *Hood v. Legg*, 160 Ga. 620 (128 S. E. 891), where he quoted from 6 R. C. L. 793, § 197, as follows: 'Public Policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do this does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation which, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract.' In this connection we call attention to the case of *Legg v. Hood*, 154 Ga. 28 (113 S. E. 642), where it was held that 'where a proprietor sells out a given business, and as a part of the contract covenants not to engage in a similar business in a particular locality, if such covenant is reasonable and otherwise proper it will not be set aside as void on the ground that it is in

> restraint of trade and contrary to public policy.' In the case at bar the defendant admits in his answer that he acted at times as 'bookkeeper and salesman' in his present employment; and we hold that his participation, directly or indirectly, as clerk, bookkeeper, salesman, or in any other capacity, in the same or similar business as that involved in the contract between petitioner and defendant, was a violation of the express covenants therein contained."

This Court is of the opinion that the case at hand is controlled by the teachings of *Strauss v. Phillips*, supra, and the cases cited therein, and that the covenant not to compete executed in the contract of sale between the parties in April, 1966, is valid and enforceable.

For the reasons given, the judgment of the District Court as to the validity of the contract is reversed and the cause is remanded for further proceeding consistent with the views expressed herein.

Reversed and Remanded.

APPENDIX III.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1968.

No. 26,093.

D. C. Docket No. CA 1945.

The Day Companies, Inc.,
Appellant,

versus

Claud T. Patat, Jr., Et Al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby,

reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Claud T. Patat, Jr., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 26, 1968

Issued as Mandate:

APPENDIX IV.

[247a]-Morgan

In the United States Court of Appeals
For the Fifth Circuit.

No. 26,093.

The Day Companies, Inc.,
Appellant,

v.

Claud T. Patat, Jr., Et Al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(December 23, 1968)

On Petition for Rehearing.

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Per Curiam:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby Denied.